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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

STEPHEN A. COHEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. SHOULD THE MANAGING PARTNER OF A PUBLIC ACCOUNTING FIRM WITH 13 PARTNERS AND OVER 330 ACTIVE CLIENTS, AND A SEPARATE TAX DEPARTMENT, BE DEEMED TO HAVE WILLFULLY AIDED OR ASSISTED TWO INDIVIDUAL CLIENTS OF THE FIRM IN THE PREPARATION AND FILING BY SUCH CLIENTS OF FALSE INDIVIDUAL INCOME TAX RETURNS WHEN THE MANAGING PARTNER HAD NO KNOWLEDGE THAT SUCH CLIENTS HAD FAILED TO DISCLOSE AS INCOME ON SUCH RETURNS PERSONAL EXPENSES PAID ON THEIR BEHALF BY THEIR COMPANY AND WHEN THE MANAGING PARTNER ENGAGED IN NO ACTIONS WHICH ENCOURAGED THE PREPARATION AND FILING OF SUCH FALSE RETURNS?

2. MAY A SINGLE CONTINUOUS CONSPIRACY TO DEFRAUD THE UNITED STATES BE INFERRED FROM AN ALLEGED BRIBERY INCIDENT OCCURRING IN 1980 IN CONNECTION WITH THE INTERNAL REVENUE SERVICE AUDIT OF CORPORATE TAX RETURNS, ON THE ONE HAND, AND THE SEPARATE AND UNRELATED ALLEGED AIDING AND ASSISTING OF INDIVIDUAL TAXPAYERS IN THE PREPARATION AND FILING OF FRAUDULENT INCOME TAX RETURNS APPROXIMATELY THREE YEARS LATER?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEPHEN A. COHEN respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit entered on June 12, 1991, affirming his conviction in the Eastern District of Pennsylvania on one count of conspiring to defraud the United States and six counts of aiding and assisting in the preparation and presentation of false and fraudulent individual income tax returns.

OPINIONS BELOW

The judgment order of the United States Court of Appeals for the Third Circuit affirming Mr. Cohen's conviction was filed on June 12, 1991, and is not published. App. A. Rehearing was denied by the Court of Appeals on August 2, 1991. App. B. The memorandum and order of the District Court (Shapiro, J.), dated December 26, 1990, is not published. It appears as Appendix C.

The Order dated July 20, 1990 of the district court dismissing Counts 2 and 3 of the original indictment because the government failed to support the allegations of such Counts is not published and is set forth as Appendix D. The Order filed October 16, 1990, of the district court prohibiting the introduction of certain testimony of the immunized taxpayers at a joint trial of Stephen Cohen and Joseph Ariano is not published and is set forth as Appendix E. The order of the district court filed October 16, 1990, severing the trials of Stephen A. Cohen and Joseph Ariano, is not published and is set forth as Appendix F.

JURISDICTION

The judgment order of the United States Court of Appeals for the Third Circuit affirming petitioner's conviction on direct appeal was entered June 12, 1991. Rehearing was denied on August 2, 1991. This petition is filed within 90 days of that date. Rules 13.1, 13.4 (1990 rev.). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 18, United States Code, provides, in pertinent part:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

. . .

Title 26, United States Code, provides, in pertinent part:

§ 7206. Fraud and false statements.

Any person who --
* * * *
(2) **Aid or assistance.** Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter . . .
* * * *
shall be guilty of a felony . . .

STATEMENT OF THE CASE

This petition is filed by Stephen A. Cohen, a certified public accountant and managing partner of the public accounting firm of Morris J. Cohen & Co.

Mr. Cohen was indicted of six counts of aiding and abetting the filing of false tax returns (26 U.S.C. § 7206(2)) and one count of conspiring to defraud the United States government (18 U.S.C. § 371). The substantive counts were based on the individual tax returns of James and Robert Gillin for calendar years 1982, 1983, and 1984. The Gillins were the shareholders and officers of Petroleum Heat & Power Company, Inc. ("Petro"). The conspiracy count alleged that Mr. Cohen conspired with these same clients to defraud the United States in the ascertainment and collection of income taxes during the period of time from January 1978 through December 1985. From 1971 through 1985, the Gillins and Petro were clients of Morris J. Cohen & Co.

In a shocking and unusual deal reached between the government and the Gillins, in August 1986, the government granted the Gillins immunity from prosecution in connection with the tax years in question and the events surrounding this case. At the trial, the Gillins testified in great detail to long and continuous efforts to omit personal expenses paid by Petro from their personal federal income tax returns. These illegal activities did not include or involve Mr. Cohen and began long before the Gillins became clients of Morris J. Cohen & Co.

The substantive counts of the indictment charged that the Gillins had not reported as income on their individual 1982, 1983, and 1984 income tax returns, personal expenses which were paid on their behalf by Petro and that Mr. Cohen aided and assisted the Gillins in this regard. For the tax years in question, the total tax deficiency alleged by the government to have resulted from the tax fraud of the Gillins was only approximately $13,500.

The conspiracy count of the indictment alleged a continuous conspiracy between Mr. Cohen and the Gillins from January 1978 through December 1985. One of the overt acts alleged by the government to have been taken in furtherance of the conspiracy was that "[o]n or about July, 1980, defendant Stephen A. Cohen solicited bribe money from Robert Gillin which Cohen stated he would pay to an Internal Revenue Service

Agent who was conducting an audit of the 1977 and 1978 Petro corporate income tax returns, in order to have the IRS agent perform only a superficial audit and not require any substantiation of questioned personal expenses." The government has never charged Mr. Cohen with bribery and never called any government agents during the trial to substantiate the alleged bribe. Over the strenuous objection of Mr. Cohen, the Gillins were permitted by the district court to testify about monies they contend were paid to Mr. Cohen by them. During his testimony, Mr. Cohen unequivocally denied such allegations and demonstrated that he was in Florida on a business trip on the date in question.

Stephen A. Cohen was the managing partner of the public accounting firm of Morris J. Cohen & Co. located in Philadelphia, Pennsylvania. Morris J. Cohen & Co. had 13 partners and over 330 active clients. The firm had a separate tax department which was responsible for the preparation and review of the individual income tax returns of the firm's clients including the Gillins. Petro and the Gillins were relatively small clients of the firm, accounted for only about one percent to one-half of one percent of the firm's annual billings, and were not profitable accounts for the firm. Joseph Ariano, a partner of Morris J. Cohen & Co., was the partner who was responsible for the Petro account.

At the trial, the Gillins testified that in 1963 they began having their company, Petro, pay their personal expenses and intentionally failed to report such amounts as income on their individual income tax returns. James Gillin testified at the trial that he had filed false individual income tax returns since 1963. Morris J. Cohen & Co. did not begin representing the Gillins until 1971. The Gillins' personal income tax returns for the calendar years 1982, 1983 and 1984 were prepared by Morris J. Cohen & Co. directly from the Form W-2 and other records supplied to it by the Gillins. Mr. Cohen, being the managing partner of the firm, did not prepare or sign the Gillins' personal income tax returns and the Gillins could not remember any specific instances during which he discussed those returns with them.

The testimony at the trial clearly demonstrated that the individual income tax returns of the Gillins were not part of Mr. Cohen's concern. Morris J. Cohen & Co. was recommended to the Gillins and Petro by First Pennsylvania Bank in 1971 at a time when Petro was assigned to the "workout unit" in the bank. The bank had made a line of credit available to Petro in the amount of $7,000,000 to $10,000,000. The maintenance of

the line of credit, which was to be repaid upon demand of the bank, was essential to Petro's business during the heating season which occurred each year from the middle of November until the middle of March. Mr. Cohen's personal involvement with the Petro account was limited to making sure that the company's line of credit was available and assisting Petro in its dealings with the bank. The line of credit was personally guaranteed by the Gillins and therefore, their personal assets were at risk if Petro was unable to repay the line of credit.

Trial by jury commenced on October 15, 1990, and on October 24, 1990, the jury returned a verdict of guilty on all counts. On January 10, 1991, the district court imposed a probationary sentence of five years and a fine in the amount of $145,000. In addition, Mr. Cohen was ordered to withdraw as a partner of Morris J. Cohen & Co. and to resign from those board of director positions in which he functioned as a financial officer or advisor. These included resigning as Treasurer of Catholic Charities Appeal for the Archdiocese of Philadelphia, as Chairman of the Finance Committee of Catholic Social Services, as a financial consultant to the board of directors of Martins Run, a nonprofit retirement home, and as a member of the advisory board of Jefferson Bank. Mr. Cohen was permitted to continue serving in numerous other charitable and civic positions.

Judgment of the district court was filed on January 16, 1991, and a timely appeal was taken to the Third Circuit which affirmed in a judgment order. App. A. Rehearing was denied. App. B. The United States District Court for the Eastern District of Pennsylvania had subject matter jurisdiction under 18 U.S.C. § 3231, in that the indictment charged offenses against the United States allegedly committed within that District. The Court of Appeals' appellate jurisdiction rested upon 28 U.S.C. § 1291.

REASONS FOR GRANTING THE WRIT

1. THE MANAGING PARTNER OF A PUBLIC ACCOUNTING FIRM WITH 13 PARTNERS AND OVER 330 ACTIVE CLIENTS, AND A SEPARATE TAX DEPARTMENT, COULD NOT HAVE WILLFULLY AIDED AND ASSISTED TWO INDIVIDUAL CLIENTS OF THE FIRM IN THE PREPARATION AND FILING BY SUCH CLIENTS OF FALSE AND FRAUDULENT INDIVIDUAL TAX RETURNS WHEN THE MANAGING PARTNER HAD NO KNOWLEDGE THAT SUCH CLIENTS HAD FAILED TO DISCLOSE AS INCOME ON SUCH RETURNS PERSONAL EXPENSES PAID ON THEIR BEHALF BY THEIR COMPANY AND WHEN THE MANAGING PARTNER ENGAGED IN NO ACTIONS WHICH ENCOURAGED THE PREPARATION AND FILING OF SUCH FALSE RETURNS.

a. A managing partner of an accounting firm with 13 partners and over 330 active clients, and with a separate tax department, did not engage in any actions which amounted to aiding, abetting, counseling, procuring, or advising, the preparation and presentation of false individual tax returns.

In order to be convicted under 26 U.S.C. §7206(2) of aiding, abetting, counseling, procuring, or advising the preparation and presentation of tax returns, this Court has made it clear that Mr. Cohen must have engaged in some affirmative participation which at least encouraged the perpetration of the presentation and preparation of the false tax returns. See Nye & Nissen Corp. v. United States, 336 U.S. 613 (1949); United States v. Johnson, 319 U.S. 503 (1943). Mr. Cohen's actions do not constitute the type of acts required by this Court in order to sustain a conviction. There is no evidence that Mr. Cohen specifically told the taxpayers that they did not have to pay any income taxes on the particular income in question or that Mr. Cohen encouraged the taxpayers not to report as income the personal expenses paid on their behalf by their company.

During the years in question in this case, Mr. Cohen served as managing partner of Morris J. Cohen & Co., a public accounting firm located in Philadelphia, Pennsylvania. Morris J. Cohen & Co. had 13

partners and over 330 active clients. The firm had a separate tax department which was responsible for the preparation and review of the individual income tax returns of the firm's clients including the Gillins. There was simply no evidence that Mr. Cohen, as the managing partner of the firm, would have had any knowledge whatsoever concerning the personal income tax returns of individual clients of the firm.

The Gillins and Petro were relatively small clients of the firm. They accounted for only about one percent to one-half of one percent of the firm's annual billings, and were not profitable accounts for the firm. Joseph Ariano, a partner of Morris J. Cohen & Co., was the partner who supervised the Gillins' account and was familiar with and handled the details thereof. For the tax years in question, the total tax deficiency alleged by the government to have resulted from the tax fraud of the Gillins was only approximately $13,500. Simply put, there is no evidence which demonstrates that Stephen A. Cohen aided, abetted, advised, or counseled the Gillins, in violation of 26 U.S.C. §7206(2), in the preparation of the returns in question.

The substantive offense with which Mr. Cohen was actually charged is the aiding and abetting in the preparation and presentation of the personal income tax returns of the Gillins for the 1982, 1983 and 1984 calendar years. Mr. Cohen has not been charged with the aiding and abetting in the preparation or presentation of any of Petro's corporate income tax returns. In fact, prior to the trial, the district court granted the government's motion to dismiss the substantive counts of the indictment relating to the Petro corporate income tax returns due to the failure of the government to prove the allegations contained therein. See App. D. The government subsequently filed a new, redacted indictment against Mr. Cohen.

In 1963 the Gillins began the practice of having Petro pay their personal expenses and not reflecting such amounts as income on their tax returns. James Gillin testified that he had filed false individual income tax returns since 1963. However, Morris J. Cohen & Co. did not begin representing the Gillins until 1971. The personal income tax returns of the Gillins for the calendar years 1982, 1983 and 1984 were prepared by Morris J. Cohen & Co. directly from the Form W-2 and other records supplied to it by the Gillins. According to the government, from time to time, Mr. Cohen attempted to limit the amount of personal expenses of the Gillins which were paid by Petro. For example, when the First

Pennsylvania Bank was considering calling Petro's line of credit loan, the government contends that Mr. Cohen attempted to limit the Gillins' personal expenses that were paid for by the business to $5,000 per month. Significantly, the government produced no evidence that Mr. Cohen prepared or signed the Gillins' personal income tax returns and the Gillins could not remember any specific instances during which he discussed those returns with them.

The government argued in its brief before the Court of Appeals that certain testimony of Marie Malnati, the Gillins' longtime bookkeeper and employee, and James Gillin was sufficient to convict Mr. Cohen of aiding and abetting. James Gillin testified that Mr. Ariano, a partner of Morris J. Cohen & Co., told him that Stephen Cohen had to approve the individual income tax returns of the Gillins. Marie Malnati testified that Mr. Cohen would review "the final reports that came back to the Gillins to be signed, the Federal tax returns . . ." These unsupported and vague statements, even if true, cannot support beyond a reasonable doubt the conclusion that Mr. Cohen aided and abetted the preparation and presentation of false income tax returns. To hold otherwise would be to convict petitioner of aiding and abetting solely by virtue of serving as managing partner of Morris J. Cohen & Co.

The record is barren of any evidence that Mr. Cohen actually reviewed or approved the tax returns, or that he ever advised the Gillins not to report as income on their individual tax returns any of the personal expenses that were paid for by Petro, or that he ever had any knowledge that the Gillins were engaging in tax fraud. The actions of Mr. Cohen in this case do not nearly approach those required by this Court to sustain a conviction for aiding and abetting. This Court should grant certiorari to consider the question of whether a managing partner of a public accounting firm could be deemed to have engaged in any actions which would constitute aiding and assisting under 26 U.S.C. § 7206(2) where there is no affirmative participation which encourages the tax fraud of the taxpayers.

b. A managing partner of an accounting firm with 13 partners and over 330 active clients, and with a separate tax department, did not willfully aid and assist in, counsel and advise the preparation and presentation of false individual income tax returns.

The individual income tax returns of the Gillins were not part of Mr. Cohen's concern as managing partner of a busy and thriving public accounting firm. In order to convict Mr. Cohen under 26 U.S.C. §7206(2), the law as established by this Court requires a specific intent to defraud the Internal Revenue Service and this means that Mr. Cohen's conduct must have tax fraud as an objective. United States v. Ingram, 360 U.S. 672 (1959). In United States v. Pomponio, 429 U.S. 10 (1976) (per curiam), clarifying United States v. Bishop, 412 U.S. 346 (1973), this Court held that the term "willfully" as used in 26 U.S.C. §7206(2) means a voluntary, intentional violation of a known legal duty. Willfulness means intentional action with a bad purpose, that is, a deliberate commission of the specified violation with the idea of evading taxes and with the intention of getting away with it. See Cheek v. United States, 498 U.S. __, 112 L.Ed.2d 617 (Jan. 8, 1991). The decision of the district court and the judgment order of the Court of Appeals directly contradicts the holdings of this Court.

It is not possible that Stephen Cohen acted with willfulness - that is, with the specific intent to aid and assist in the presentation and preparation of fraudulent personal income tax returns. Morris J. Cohen & Co. was recommended to Petro by First Pennsylvania Bank in 1971 at a time when Petro was assigned to the "workout unit" in the bank. The line of credit made available to Petro by the bank was in the amount of $7,000,000 to $10,000,000. The maintenance of the line of credit, which was to be repaid upon demand of the bank, was essential to Petro's business during the heating season which occurred each year from the middle of November until the middle of March. Mr. Cohen's personal involvement with the Petro account was limited to making sure that the company's line of credit was available and assisting Petro in its dealings with the bank. The line of credit was personally guaranteed by the Gillins and therefore, their personal assets were at risk if Petro was unable to repay the line of credit.

The government and the district court put great emphasis on the testimony of the Gillins that in the late 1970's, Mr. Cohen advised them

not to sell Petro. Robert Gillin testified as follows:

> Well, any time I brought up selling Petro, he always thought it was a poor- a poor move, I'd be foolish to sell Petro, felt that it was a cash cow, that the expenses if we were able to get through there, we would be able to — he used to say suppose you could get x number of million for it, by the time you paid the taxes, and you split it and tried to live off what you got, its nowhere in comparison to what your salary is now and what your perks are or your goodies. (3d Cir. Appx. 328-329)

This alleged statement, even if made, is grossly inadequate to demonstrate the specific intent of Mr. Cohen to assist the Gillins in evading personal income taxes through the filing of fraudulent individual income tax returns. In fact, this alleged statement specifically contemplates that taxes would be paid on any such sales proceeds. In addition, the ordinary meaning of the words "perks" or "goodies" are benefits in addition to salary provided to an employee by a corporation, such as individual life and health insurance, disability insurance, entertainment expenses, retirement benefits, and automobile expenses. These expenses would be paid by Petro whether or not any income taxes were paid by the Gillins on the value of such benefits. Obviously, if Petro were sold, none of these benefits would be available to the Gillins.

The government and the district court also put misplaced importance upon the testimony of Kathy Morris, a former employee of Morris J. Cohen & Co. She testified that when she was finishing up the audit of Petro for the fiscal year ended May 31, 1983, Mr. Cohen came into her office and asked her how she was progressing. Ms. Morris then states:

> I specifically remember saying that if I remember correctly, the company had had a loss or a small profit. I can't quite remember that part. What I remember is that I said that their profit would be much better, if they weren't taking so many personal expenses out of the corporation. And it

> would look better to the bank. Their financial condition would look better to the bank and that helps us as that representatives to third parties, being the bank and other lenders. (3d Cir. Appx. 524-525)

This testimony, rather than establishing an intent to evade taxes, clearly demonstrates that Mr. Cohen was concerned solely with the continued good graces of the bank towards Petro. In fact, such testimony contradicted Ms. Morris' statement which had been given to the government prior to the trial that she was unaware of any such conversations with Mr. Cohen. Mr. Cohen did not possess the specific intention to aid and abet the Gillins in filing false and fraudulent individual income tax returns. This Court should grant certiorari to consider the question of whether the specific intent required by this Court to be convicted of aiding and abetting has been met in this case.

c. Because Petitioner did not aid and assist the preparation and filing of fraudulent individual income tax returns, the jury may have relied upon impermissible grounds when it convicted him of conspiring to defraud the United States and therefore, a new trial is required.

Because the evidence did not establish that Mr. Cohen had the specific intent required by this Court to support a conviction of aiding and abetting the preparation and presentation of false income tax returns or that he engaged in any actions required by this Court to support a conviction of aiding and abetting, he is entitled to a new trial on the conspiracy count of the indictment. The jury could have wrongly concluded that Mr. Cohen joined the conspiracy alleged in the indictment through an agreement to aid and abet the filing of false tax returns. Even if Mr. Cohen agreed that the Gillins could have Petro pay their personal expenses, this does not establish the specific intent to evade personal income taxes required by this Court in order for there to be a violation of 26 U.S.C. §7206(2). See United States v. Ingram, supra. Alternatively, the jury could have based its verdict on one of the overt acts of the indictment that alleges that Mr. Cohen "caused the preparation of" individual income tax returns.

Under the district court's instructions to the jury, the jury could have convicted Mr. Cohen of conspiracy on any number of impermissible theories:

> Now, all of the means or methods that the Government has charged don't have to be agreed upon to carry out this alleged conspiracy, and all of the means that are agreed upon don't have to be used. But what the evidence in this case must show beyond a reasonable doubt is that this charged conspiracy was knowingly formed, and that one or more of the means that the Government has charged was agreed upon to be used in an effort to affect or accomplish the object or purpose of the conspiracy that was charged in the indictment, and that two or more people including the accused was a member of the conspiracy that the Government charges. (3d Cir. Appx. 950)
>
> . . .
>
> And there have been numerous overt acts charged by the Government here in the Eastern District of Pennsylvania and elsewhere. The Government doesn't have to prove everything it charged, but it does have to prove some overt act in furtherance of the conspiracy and all of you have to unanimously agree on what that overt act is. (3d Cir. Appx. 950)

The jury rendered a general verdict on the conspiracy count pursuant to these instructions. Because the jury was authorized to convict on Count I (conspiracy count) on the insufficient aiding and abetting theory, a new trial is required on the conspiracy charge.

2. A SINGLE CONTINUOUS CONSPIRACY TO DEFRAUD THE UNITED STATES MAY NOT BE INFERRED FROM AN ALLEGED BRIBERY INCIDENT OCCURRING IN 1980 IN CONNECTION WITH THE INTERNAL REVENUE SERVICE AUDIT OF CORPORATE TAX RETURNS, ON THE ONE HAND, AND THE SEPARATE AND UNRELATED ALLEGED AIDING AND ASSISTING OF INDIVIDUAL TAXPAYERS IN THE PREPARATION AND FILING OF FRAUDULENT INCOME TAX RETURNS APPROXIMATELY THREE YEARS LATER.

a. Because the fatal variance between the single conspiracy alleged in the indictment and the separate schemes evidenced at trial resulted in substantial prejudice to Petitioner, Petitioner is entitled to a new trial on the conspiracy charges.

The jury was so confused by the evidence of conspiracy presented by the government and the trial court's jury instructions in this regard, that further clarifying instructions were actually necessary during the course of the jury's deliberations following the trial. Even the district court's supplemental instructions at that time were vague and, by admission of the district court, incorrect, and had to be corrected and repeated.

The indictment alleges a continuous and continuing conspiracy from January 1978 through December 1985 in violation of 18 U.S.C. § 371. The specific conspiracy alleged by the Government is that "defendants Stephen A. Cohen and Joseph Ariano together with James Gillin, Jr., and Robert Gillin, did knowingly and willfully conspire and agree to defraud the United States of America, by impeding, impairing, defeating and obstructing the lawful functions of the Internal Revenue Service." Notwithstanding the allegations of the indictment, the government failed to prove an underlying agreement between the conspirators to continuously defraud the Internal Revenue Service.

What the trial record demonstrates is, at best, two separate, disjointed and distinct conspiracies. This Court has clearly and unequivocally held that a continuing, underlying agreement must be proven by the government in order for petitioner to be convicted of conspiracy. Grunewald v. United States, 352 U.S. 391 (1956). To establish the single, overriding agreement of conspiracy as charged, the government would rely on the alleged bribe incident concerning an audit of the Petro corporate

returns which occurred in July 1980, which was introduced solely through the testimony of the immunized taxpayers, on the one hand, and the activity of the Morris J. Cohen & Co. firm in connection with the Gillins' individual income tax returns for 1982, 1983, and 1984 on the other. The Government failed to demonstrate any connection between these two offenses or any underlying conspiracy or plot that would join the two dissimilar incidents together. There is absolutely no evidence of an underlying agreement to defraud which covered the entire period alleged by the government in the indictment.

Petitioner's conviction of conspiracy conflicts with prior decisions of the Court. The Court of Appeals overlooked this fatal defect in the government's case. In the district court's Memorandum and Order, the district court supports its finding that the government had proven a conspiracy by citing alleged acts and knowledge of Mr. Ariano, the Morris J. Cohen & Co. partner assigned to the Petro account, relating to the false and fraudulent income tax returns of the Gillins. Such acts and knowledge were, however, only related to the 1982, 1983, and 1984 individual income tax returns of the Gillins. These instances of conduct fall short, therefore, of proving a continuous agreement to defraud the United States during the years 1978 to 1985 by a variety of means.

The district court begged the question whether a continuous conspiracy had been proven by the Government:

> Defendant has maintained that the bribe evidence was inadmissible because it was a separate conspiracy from a conspiracy to aid and abet the filing of false income tax returns. Perhaps so, but the government must show that the overt acts charged in the indictment were taken in furtherance of the conspiracy charged. The bribe attempt in 1980 was in furtherance of the conspiracy to obstruct the functions of the IRS in collecting revenues from January, 1978, to December, 1985. (App. C at A-11)

The fatal variance demonstrated by the record in this case resulted in substantial prejudice to Mr. Cohen. As previously stated, the first

conspiracy concerning the alleged bribe was separate and apart from any other conspiracy arguably shown by the Government. The alleged bribe was introduced solely by testimony of the Gillins and was emphatically denied by Mr. Cohen. As previously stated, Mr. Cohen was not charged with the substantive offense of bribery. The last overt act concerning the alleged bribery attempt was on or about July, 1980, which is more than six years prior to January, 1990, the date of the filing of the indictment in this matter. The applicable six year statute of limitations (26 U.S.C. § 6531(8)) began to run at the time of the last overt act pertaining thereto and therefore, Mr. Cohen could not be convicted of this separate conspiracy. Fiswick v. United States, 329 U.S. 211, 216 (1946); United States v. Louder, 492 F.2d 953, 955-56 (4th Cir.), cert. denied, 419 U.S. 1092 (1974). Furthermore, none of the incidents surrounding or supporting the alleged bribe should have been allowed to have been introduced against Mr. Cohen to convict him of conspiracy. The testimony of the immunized taxpayers resulted in substantial prejudice to Mr. Cohen and should not have been allowed.

One of the overt acts taken in furtherance of the conspiracy alleged in the indictment is that "in or about July, 1980, defendant Stephen A. Cohen solicited bribe money from Robert Gillin which Cohen stated he would pay to an Internal Revenue Service Agent which was conducting an audit of the 1977 and 1978 Petro corporate income tax returns" (3d Cir. Appx. 25). Mr. Cohen testified and introduced uncontradicted documentation that he was in Florida on a business trip on the specific date involved. This alleged overt act was not in furtherance of the second and separate conspiracy to file false personal tax returns, which was not time-barred. Given the general instructions of the district court regarding overt acts and the general verdict rendered pursuant thereto, the jury may have erroneously convicted Mr. Cohen of conspiracy based upon this overt act. Therefore, the error was not harmless, and Mr. Cohen is entitled to a new trial on the conspiracy count of the indictment. Grunewald, supra, at 414-415; Yates v. United States, 354 U.S. 298, 311-312 (1952).

b. Because testimony of the alleged bribe could not be introduced in connection with the conspiracy charge, the probative value of the immunized taxpayers' testimony relating to the alleged bribe was substantially outweighed by its prejudicial effect and should have been excluded entirely from the trial and therefore Petitioner is entitled to a new trial on the aiding and assisting charges.

Finally, because prosecution for the conspiracy relating to the alleged 1980 bribe was time-barred, and the Gillins' testimony in this regard should not have been introduced at the trial to convict Mr. Cohen of conspiracy, the district court's ruling that these incidents could be introduced before the jury in connection with the prosecution under 26 U.S.C. §7206(2) should be reversed. Mr. Cohen testified at the trial and submitted uncontroverted evidence that he was in Florida on a business trip on the date the alleged bribe was supposedly made. It is clear that the probative value of such evidence was substantially overshadowed and outweighed by its prejudicial effect. Scales v. United States, 367 U.S. 205 (1961). As a result, a new trial should also be required by this Court in connection with the aiding and abetting charges under 26 U.S.C. §7206(2).

CONCLUSION

For each of the foregoing reasons, petitioner STEPHEN A. COHEN prays that this Court grant his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit affirming his conviction. After review, this Court should remand for an entry of acquittal on Counts II through VII of the indictment (aiding and abetting) and in addition, remand for an entry of an order for a new trial on Count I (conspiracy) of the indictment.

Respectfully submitted,

DOUGLAS M. LURIO
Attorney for Petitioner

October 31, 1991

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1043

UNITED STATES OF AMERICA

v.

STEPHEN A. COHEN,
Appellant

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Criminal No. 90-00021-01)
District Judge: Hon. Norma L. Shapiro

Submitted Under Third Circuit Rule 12(6)
June 7, 1991

Before: SLOVITER, Chief Judge, GREENBERG
and HIGGINBOTHAM, Circuit Judges.

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit, that the district court erred:

1. because the appellant is entitled to an acquittal on the charge of conspiracy under 18 U.S.C. § 371, and

2. because the court allowed evidence of an alleged bribe, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

June 12, 1991

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1043

UNITED STATES OF AMERICA
v.
STEPHEN A. COHEN

SUR PETITION FOR REHEARING

Present: **SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and HIGGINBOTHAM*, Circuit Judges**

The petition for rehearing filed by
Appellant Stephen A. Cohen
in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Dolores K. Sloviter
Chief Judge

Dated: August 2, 1991

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* Hon. A. Leon Higginbotham, Senior Circuit Judge, as to panel rehearing only.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
	:	
v.	:	
	:	
STEPHEN COHEN	:	NO. 90-21-1

MEMORANDUM AND ORDER

NORMA L. SHAPIRO, J. DECEMBER 26, 1990

Following a jury trial, defendant Stephen Cohen, a certified public accountant, was convicted on six counts of aiding and abetting the filing of false tax returns, in violation of 26 U.S.C. § 7206(2), and one count of conspiring to defraud the United States by obstructing the functions of the Internal Revenue Service, in violation of 18 U.S.C. 371. The substantive counts were based on the federal income tax returns filed on behalf of James and Ellen Gillin for 1982, 1983, and 1984, as well as the federal income tax returns filed on behalf of Robert and Martha Gillin for 1982, 1983, and 1984, prepared by defendant's accounting firm, Morris J. Cohen & Co. Defendant now moves for a judgment of acquittal, or, in the alternative, for a new trial.

I. Motion for Judgment of Acquittal

Defendant argues that no reasonable jury could have found defendant guilty beyond a reasonable doubt on the evidence presented at trial. On a motion for judgment of acquittal, the court "must view the

evidence and inferences deductible therefrom in the light most favorable to the government." United States v. McNeill, 887 F.2d 448, 450 (3d Cir. 1988), quoting Glasser v. United States, 60, 80 (1942). Under that standard, the court finds that there was sufficient evidence to support the jury's verdicts on all counts.

A. Aiding and Abetting the Filing of False Returns

Defendant's main contention is that the government failed to prove that defendant knowingly committed the crimes charged in the indictment. However, a reasonable jury could infer from the evidence that defendant knew that the Gillins were filing false returns. Both Kathy Morris and Marie Malnati told defendant directly that the Gillins were charging personal expenses to their corporation, Petroleum Heat & Power Company, Inc. (Petro). (N.T. Vol. III 128-129, 203-211). In addition, Robert and James Gillin told defendant on numerous occasions that they were running personal expenses through the company. (N.T. Vol. II at 123-129; Vol. III at 35, 62, 87). Based on that information, defendant advised Robert Gillin not to sell Petro because it was "a cash cow," and Gillin would not receive as much income from investing the proceeds of the sale as he did from the "perks" and "goodies" received through ownership of Petro. (N.T. Vol. III at 35).

Defendant contends that even if he knew the Gillins were charging personal expenses to Petro, that does not prove he knew the Gillins were filing false personal income tax returns. Although there is no evidence that defendant participated directly in the preparation of the Gillins' personal returns, a reasonable jury could have inferred that defendant knew those returns were fraudulent and that he aided and abetted the preparation of those returns. Robert Gillin's statement that defendant told him Petro was a "cash cow" that generated substantial "perks" and "goodies" was clearly inculpatory. The jury could infer from defendant's statement that he knew the Gillins were supplementing their salaries by charging personal expenses to the corporation without paying taxes on that personal income; personal expenses run through the corporation are only a "perk" if taxes are not paid on the indirect income generated by that practice. The jury also could have inferred defendant's culpability from his dealings with the First Pennsylvania Bank on behalf of the Gillins. When the Bank considered terminating Petro's line of credit due to its low stated profits, defendant went to the Petro office, personally examined invoices and financial records, and advised the Gillin brothers to limit personal expenses paid by

the company to $5000 per month each. That defendant was not involved in the actual preparation of the Gillins' personal income tax returns does not insulate him from criminal liability. There was sufficient evidence from which the jury could have concluded defendant knowingly and willfully aided and abetted the filing of false returns.

A rational jury could have also concluded that the government met its burden of proving guilty knowledge by showing defendant "deliberately closed his eyes to what would otherwise have been obvious to him." Defendant knew the Gillins were charging personal expenses to the company and that his firm was responsible for preparing the Gillins' personal income taxes. A reasonable jury have inferred from that evidence that defendant consciously avoided learning that the Gillins' personal income tax statements were false.[1] While defendant forcefully denied such knowledge, there were inconsistencies in his testimony that could explain the jury's evident rejection of his asserted innocence.

Defendant further contends that the government failed to prove defendant knew the Gillins were charging personal expenses to the repair and maintenance account rather than the officer loan account. Charging the personal expenses as company loans to James and Robert Gillin would have been an acceptable accounting practice, if the loans were bona fide, and not simply paper adjustments to hide personal income. The Gillins would not have have had any obligation to report bona fide loans as income for the years in question. Defendant's expert on accounting procedures, Howard Braitman, testified that determining whether a loan is bona fide depends on whether it had been approved by a company's board of directors, whether it was evidenced by an interest bearing note with a fixed maturity date, and whether regular payments of interest or principal had been made. (N.T. Vol. V 25). If regular payments were not being made, "the loans were not bona fide and constituted taxable income to the taxpayer." Ibid.

---

1. The court properly instructed the jury that it could infer knowledge of the offenses from defendant's "willful blindness." The instruction made clear that the jury should make such an inference only if it believed "that defendant was subjectively aware of the high probability of the fact in question, [ ] not merely that a reasonable man would have been aware of the probability." United States v. Caminos, 770 F. 2d 361, 366 (3d Cir. 1985). In addition, a proper foundation for the Jewell instruction had been laid. Defendant claimed lack of guilty knowledge and there were facts in evidence pointing towards deliberate ignorance. See United States v. Suttiswald, 696 F. 2d 645, 60-651 (9th Cir. 1982).

The government produced ample evidence from which a reasonable jury could conclude, at least with respect to counts II, III, V, and VI, that the personal expenses were not credited to the officer loan account, or, if they were, that the loans were not bona fide. James Gillin testified that no personal expenses were charged to his loan account, no notes were drawn, and no loan payments were made to reimburse Petro for personal expenses. (N.T. Vol. III 59-60, 93). Malnati stated that no personal expenses were intentionally credited to the officer loan account, and if they were, no notes were written. (N.T. Vol III 116). And, Kathy Morris testified that in her four years of auditing the Petro accounts, she never came across entries that credited personal expenses to the officer loan account. (N.T. Vol. III 209). Robert Gillin did testify that some personal expenses were charged to the officer loan account, but stated that no notes were written for the loans and he never made repayments on them. (N.T. Vol. II 77-79).

Evidence that some loans were bona fide does not require the court to set aside the jury's verdict. The Petro financial report for 1984-85 stated as assets $95,000 of individual notes receivable. Ex. C-26 at 1. The report states that the "notes receivable" line item "represents unsecured demand notes on officers' loans bearing interest at the rate of 9% per annum." Id. at 9. Although interest appeared to have been accruing on the officer loan account during the time in question, the jury could have nevertheless concluded that the loans were not bona fide. No actual notes were in evidence and there was no testimony linking the personal expenses charged to Petro that gave rise to the charges in the indictment to the notes stated in Petro's 1984-85 report. James Gillin testified that any genuine officer loans were made to pay income taxes, not personal expenses. (N.T. Vol. III 94-95).

With respect to counts IV and VII, there was evidence that in 1984 the Cohen firm made an adjustment, reclassifying $15,060.29 of personal expenses charged to Petro's repair and maintenance account as officer loans to James and Robert Gillin. Exs. C-20, C-21, and C-22B. Defendant claims that he is entitled to a judgment of acquittal on counts IV and VII because if the adjustment to the repair and maintenance account was subtracted from the amount of unreported income charged in the indictment, the Gillins' 1984 tax returns would not be "materially false" as a matter of law.

Materiality is an issue of law to be determined by the court. United States v. Steele, 896 F.2d 998, 1006 (6th Cir. 1990). At the close of the

government's case, the court found that the government had met its burden of proving that the income tax returns at issue in counts IV and VII were false in the amounts stated in the indictment and that the underreported amount of income was material as a matter of law. Neither of those conclusions were erroneous.

The jury could have reasonably concluded that the adjusting entry to the repair and maintenance account did not reflect genuine loans. Agent Woodruff testified that, after a review of Petro's records and books, he concluded the officers loans made in 1984 were not bona fide: "There was [sic] no notes, there was [sic] no repayments on the loans, and in fact they continually went up each year, and there was no repayment schedule or interest." (N.T. Vol. IV 67). From that evidence, the jury could have concluded the Gillins' 1984 returns were false in the amount stated in the indictment and defendant either knew this to be true or was "willfully blind" to the Gillins' false statements.

The court instructed the jury that "if what the Government charges is proved,then the amounts involved were material as to each of these taxable years." (N.T. Vol VII 19). According to the indictment, Robert and Martha Gillin failed to report 29% of their taxable income on their 1984 tax return and James and Ellen Gillin failed to report 15% of their taxable income. The proper test for determining materiality is "whether the misrepresentation or concealment was predictably capable of affecting * * * the official decision." Kungys v. United States, 485 U.S. 759, 771-772 (1988). The Gillins' failure to disclose taxable income of $8,957 (Count IV) and $14,957 (Count VII) clearly affected the IRS's ability to calculate the proper amount of income taxes due. See Steele, supra, (holding that the underreporting of taxable income was material even if it did not alter the tax liability). The charge on materiality was correct.

The government's failure to provide certified, signed copies of Robert and Martha Gillin's tax returns for 1982 and 1983 (Counts V and VI) is not a fatal defect. Uncertified, unsigned copies of those returns, obtained from defendant's firm during discovery, were introduced. The government also introduced an IRS taxpayer transcript which showed that Robert and Martha Gillin filed returns in 1982 and 1983 and that the reported adjusted gross income, tax assessed, and tax withheld were identical to the amounts listed on the uncertified returns entered into evidence by the government. In view of those similarities, it was reasonable for the jury to conclude that the unsigned, undated returns were

correct copies of the returns Robert and Martha Gillin filed with the IRS.

B. Conspiracy

The jury also could have concluded beyond a reasonable doubt that defendant conspired with Joseph Ariano to obstruct the lawful functions of the IRS. To prove a conspiracy, the government had to establish an agreement to enter a conspiracy and an affirmative act taken in furtherance of that conspiracy.

Ariano, as partner in charge of the Petro account, was responsible for preparing the Gillins' individual returns. Ariano knew the Gillins were charging personal expenses through the corporation, he assisted the Gillins in this practice, and he knew the Gillins were filing false returns. There was also evidence that defendant was aware of Ariano's activities. The bookkeeper Malnati testified that anything Ariano did with respect to the Petro account had to be approved by defendant. (N.T. Vol III 84). In addition, James Gillin testified that Ariano told him that defendant approved the personal tax returns prepared by Ariano (N.T. Vol. III 84). Finally, there was evidence that defendant and Ariano worked together to improve the financial condition of Petro (to help secure the company's line of credit) by producing a "budget" that limited the personal expenses the Gillins could charge to Petro. From that evidence, a reasonable jury could have concluded that defendant was guilty of conspiring to assist in the filing of false tax returns.

Defendant further argues that the government did not meet its burden of proving the commission of the overt act regarding a bribe of an IRS agent by defendant. But there was evidence upon which the jury could have reached its conclusion that defendant made payment of a bribe (N.T. Vol. II 63-68, 102-103; Vol. III 55-56; 80). Even so, the government is not required to establish each overt act charged in the indictment in order to prove the crime of conspiracy. The government must only prove the conspirators committed at least one of the overt acts. The jury was charged that to return a verdict of guilty, it must unanimously conclude that a particular overt act was committed. (N.T. VII 30).

II. Motion for a New Trial

A. Evidence of the Bribe

Prior to trial, defendant moved to exclude evidence that defendant bribed an IRS agent. Defendant argues that the court erred in allowing the government to introduce such evidence because 1) the government could not proffer any credible evidence that the act was committed, 2) the evidence was not relevant to the offenses for which defendant was charged, 3) the probative value of the evidence was outweighed by its prejudicial effect and 4) the overt act was not committed in furtherance of the conspiracy alleged in the indictment.

The crux of defendant's first argument is that the Gillins' testimony regarding the bribe was so incredible that a reasonable jury could not have believed it. Robert Gillin testified that defendant suggested the Gillins bribe an IRS agent in exchange for a superficial audit of Petro's 1977 and 1978 corporate returns and then arranged and paid the bribe. Even though Gillin's testimony had some inconsistencies concerning how he obtained the money for the bribe and when he gave the money to defendant, those inconsistencies go to the credibility of the testimony, not its admissibility. Credibility judgments were for the jury; proper cautionary instructions were given. (N.T. Vol. 15-16).

Evidence of the bribe was directly relevant to the conspiracy count of the indictment; the bribe was one of the overt acts. The conspiracy count alleged that from 1978 to 1985, defendant and Ariano conspired to defraud the Unites States by obstructing the lawful functions of the IRS. The bribe took place in 1980 and was paid to procure a superficial audit of Petro's 1977 and 1978 returns. The bribe occurred during the time period stated in the indictment, see United States v. Bradshaw, 787 F.2d 1385, 1392 (10th Cir. 1986) and showed that defendant took affirmative steps to defeat the Department of Treasury in collecting income taxes.

Defendant contends that the probative value of the bribe evidence in establishing defendant's participation in the conspiracy was minimal because the bribe payment took place after the audits of Petro's 1977 and 1978 returns had been completed. However, as defendant conceded at oral argument, the Gillins had not yet filed one set of personal returns when the bribe payment was made. The bribe payment might have been to assure that the personal expenses charged to Petro were not deemed personal income reportable on the Gillins' personal tax returns. The bribe evidence also was relevant to defendant's knowledge of the Gillins' fraudulent

practices and his intent to commit the crime of aiding and abetting the filing of a false tax return.

Defendant has maintained that the bribe evidence was inadmissible because it was a separate conspiracy from a conspiracy to aid and abet the filing of false income tax returns. Perhaps so, but the government must show only that the overt acts charged in the indictment were taken in furtherance of the conspiracy charged. The bribe in 1980 was in furtherance of the conspiracy to obstruct the functions of the IRS in collecting revenue from January, 1978, to December, 1985.

B. Material Falsity of the 1982, 1983, and 1984 Returns of Robert and Martha Gillin and the 1984 Return of James and Ellen Gillin.

For reasons already stated in this opinion, supra at 6-8, the court concludes that the 1982, 1983, and 1984 federal income tax returns of Robert and Martha Gillin, and the 1984 federal income tax return of James and Ellen Gillin were materially false as a matter of law.

C. Evidence of Uncharged Acts of Misconduct

Defendant claims that the court improperly permitted the Gillins to testify that defendant participated in their scheme to have their personal expenses paid by Petro prior to 1982. But this evidence tended to show defendant's intent to commit the substantive crimes charged in indictment. Admission of this evidence did not violate Fed.R.Ev. 404(b).

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**CRIMINAL ACTION**
	:	
v.	:	
	:	
STEPHEN COHEN	:	**NO. 90-21-1**

ORDER

AND NOW, this 26th day of December, upon consideration of defendant's motion for judgment of acquittal, or in the alternative, for a new trial, the government's response thereto, and transcripts of the trial, and following oral argument on the motion, it is **ORDERED** that the motion is **DENIED**.

/s/ Norma L. Shapiro
J.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	
v.	:	**CRIMINAL NO. 90-21-1**
	:	**90-21-2**
STEPHEN COHEN	:	
JOSEPH D. ARIANO	:	

ORDER

AND NOW, this 20th day of July, 1990, following a status hearing held in this matter this date, it is **ORDERED** that:

1. Trial in this matter is **CONTINUED** to **Monday, October 15, 1990** at **10:00 a.m.** in Courtroom 10-A. If defendant Ariano is unable to proceed to trial at that time, the case will be **SEVERED** as to that defendant. The government shall be prepared to request examination of defendant Ariano by its physician, if necessary, to determine when this defendant can proceed to trial. **NO FURTHER CONTINUANCES WILL BE GRANTED**.

2. The Government's motion to dismiss Counts 2 and 3 as to defendants Cohen and Ariano is **GRANTED**.

/s/ Norma L. Shapiro
J.

ENTERED: 07/23/90
CLERK OF COURT

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	**No. 90-00021-01**
	:	**90-00021-02**
v.	:	**(Hon. Norma L. Shapiro)**
	:	
STEPHEN COHEN	:	
JOSEPH D. ARIANO	:	

ORDER

AND NOW, to wit this day of , 1990, upon consideration of the Defendants' Motion to Strike an Overt Act and To Preclude Evidence at Trial relating thereto, it is hereby ORDERED that the defendants' motion is granted and the Government is directed not to introduce at a joint trial of defendants Cohen and Ariano any testimony or evidence relating to the Overt Act alleged in Paragraph 1 of the Indictment.

BY THE COURT:

/s/ Norma L. Shapiro
NORMA L. SHAPIRO, J.

Dated:

ENTERED: October 16, 1990
CLERK OF COURT

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
vs.	:	**CRIMINAL NO. 90-21-2**
JOSEPH D. ARIANO	:	

ORDER

AND NOW, this 15th day of October, 1990, the Court finds that the above action cannot proceed to trial and disposition and must be continued because of the following reason:

[X] - The failure to grant such a continuance in the proceeding would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice.

[ ] - The case taken as a whole is so unusual and so complex, due to the number of defendants or the nature of the prosecution and other complexity, that it is unreasonable to expect adequate preparation within the periods of time established.

[X] - Other: The court has granted the government's motion to sever this defendant. Trial of defendant Cohen (90-21-1) has begin 10/15/90.

WHEREFORE, in accordance with 18 U.S.C. § 3161(h) (8), the Court finds that the ends of justice served by granting this continuance outweigh the best interests of the public and the defendant in a speedy trial and, therefore, orders this case continued.

BY THE COURT:

/s/ Norma L. Shapiro
JUDGE

SPEEDY TRIAL ACT DELAY CODE (T)
xc: Speedy Trial Clerk

ENTERED: October 16, 1990
CLERK OF COURT